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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

HONORABLE STEPHEN V. WILSON, U.S. DISTRICT JUDGE

VERNON UNSWORTH,

Plaintiff,

vs. Case No. CV 18-8048-SVW

ELON MUSK,

Defendants.

REPORTER'S TRANSCRIPT OF
MOTION FOR SUMMARY JUDGMENT
MONDAY, OCTOBER 28, 2019
1:30 P.M.
LOS ANGELES, CALIFORNIA

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1 **LOS ANGELES, CALIFORNIA; MONDAY, OCTOBER 28, 2019**

2 **1:30 P.M.**

3 **--oOo--**

4
5 Please be seated and come to order.

6 Calling Item No. 8, *CV 2018-8048, SVW, Vernon Unsworth*
7 *versus Elon Musk.*

8 Counsel, please state your appearances.

9 MR. WOOD: Lin Wood from Atlanta, Georgia,
10 representing the plaintiff, Vernon Unsworth, Your Honor.

11 MR. WILSON: Good afternoon, Your Honor. Taylor
12 Wilson on behalf of the plaintiff, Mr. Unsworth.

13 MR. WOOD: Matt Wood on behalf of plaintiff,
14 Mr. Unsworth.

15 MR. CHATHAM: Christopher Chatham on behalf of
16 plaintiff, Mr. Unsworth.

17 MS. WADE: Nicole Wade on behalf of the plaintiff.

18 MR. SCHWARTZ: Good afternoon, Your Honor. Robert
19 Schwartz and Michael Lifrak for the defendant, Elon Musk.

20 THE COURT: This is the time for hearing on the
21 summary judgment motion.

22 The Court has given a lot of time to the pleadings and has
23 considered all of the cases cited and has gone beyond and
24 noticed the hearing because I thought it would be a last
25 opportunity for the parties to bring to the Court's attention,

1 if that is their thought, any new matter or if the party that
2 didn't have a chance to respond to the last pleading had some
3 comment.

4 Otherwise, I'm prepared to make rulings, but I thought I
5 would give the parties that opportunity, if they wished, it's
6 up to you.

7 MR. WOOD: Thank you, Your Honor. I'm the
8 non-movant, but for Mr. Unsworth, I believe that our briefs
9 have been within the page limit very detailed, and we have
10 outlined in our statement of facts that we believe are correct
11 and create genuine issues of material fact.

12 I don't believe that there are any matters that I need to
13 address with the Court that have not been thoroughly covered in
14 our pleadings; however, if the Court has any questions of
15 counsel, I'm happy to try to answer any of those.

16 THE COURT: All right, I don't.

17 MR. WOOD: Thank you.

18 THE COURT: The same for the defendant?

19 MR. SCHWARTZ: Good afternoon, Your Honor.

20 Obviously, I don't know what the Court's thinking is on these
21 issues. We came prepared to address questions the Court might
22 have.

23 THE COURT: I don't have any questions, and it's
24 because I did consider your papers and the cases and there
25 weren't that many informative cases on some of the issues, so

1 they were all considered.

2 You know, you are all very experienced lawyers and summary
3 judgment is not a jury argument, so it takes away a lot of what
4 lawyers normally do.

5 So it was more or less a courtesy to the lawyers to see if
6 they had a last thought or sometimes a wrinkle or whatever.

7 I'm not suggesting you ought to, I'm not just suggesting
8 you haven't fully argued your point, I just thought I would
9 give you the opportunity.

10 MR. SCHWARTZ: I understand, Your Honor. To be
11 candid with the Court, in between the time we filed our reply
12 brief and today, I gave additional thoughts to the issues and
13 thought of other ways that might assist the Court.

14 THE COURT: Go ahead.

15 MR. SCHWARTZ: I really don't want to indulge the
16 Court.

17 THE COURT: No. I have nothing to do this
18 afternoon.

19 MR. SCHWARTZ: The gateway issue in the case, I
20 think for summary judgment and a trial would be what kind of a
21 person for libel purposes is the plaintiff. Is he is a private
22 figure, a public figure, or a limited purpose public figure?

23 I think the one issue that where some further thought, at
24 least by counsel, might be helpful for the Court is the third
25 prong of that analysis, the germaneness issue, I could discuss

1 that with the Court, but again, I don't want to waste the
2 Court's time.

3 THE COURT: Well, you have discussed it, and I agree
4 with you that is an important issue and that has been
5 considered, but what other argument do you propose to make that
6 is different than the one you have already made?

7 If you have a different argument or some different spin on
8 it, I will consider it, then go ahead.

9 MR. SCHWARTZ: The legal standard is important
10 before appreciating the facts or to enable the Court to
11 appreciate the facts, one has to understand the legal standard.

12 And the legal standard is extremely liberal and generous
13 as it must be to protect the First Amendment interests that are
14 at stake in any libel case, including one that involves social
15 media or formal media as this case does.

16 What the Courts tell us is that so long as the matter that
17 is claimed to be libelous -- well, I guess the standard is
18 anything which might touch on the issues in controversy is
19 germane, and only if the matter is wholly unrelated to the
20 matters in controversy.

21 THE COURT: Well, the word that is used is germane.

22 MR. SCHWARTZ: It is, Your Honor, but the Courts
23 breathe life into that for First Amendment purposes.

24 So the D.C. Circuit in the *Jankovic* case tells us that the
25 standard is that the matter is germane unless it is wholly

1 unrelated.

2 So that's what that germane standard means, and that the
3 Georgia Court of Appeals in the *Jewell* case tells us that
4 anything which might touch on the controversy is relevant,
5 particularly in a case like this, where if I can quote from
6 that opinion: A statement is germane to the plaintiff's
7 participation in the controversy if it might help the public
8 decide how much credence should be given to the plaintiff.

9 THE COURT: I don't disagree with that.

10 MR. SCHWARTZ: Then in order -- let's put then the
11 facts and bones -- some facts on those bones, Your Honor, to
12 understand what is going on here.

13 The allegation is, of course, that Mr. Musk in the
14 Buzzfeed article accused Mr. Unsworth of marrying a child
15 bride, a child rapist, pedophile -- actually didn't say
16 pedophile -- but child rapist, and in the prior Tweets called
17 him a pedo guy.

18 The question I think that the plaintiff's put to the Court
19 is, well, how could that have anything to do with whether the
20 rescue sub would have worked, but that is not a controversy.

21 If you define the controversy so narrowly, it makes it a
22 little bit easier to make the germaneness argument, and that's
23 what I want to talk to the Court about to make sure the scope
24 and breadth of the controversies, plural, that were bubbling
25 through the media ether, if you will, during the time in which

1 these comments were made.

2 Those controversies concerned, among other things, what
3 was the right rescue strategy to save these kids.

4 There were articles being written at the time, should they
5 try and use helicopters to parachute in or repel into get the
6 kids that way, should they bring in boring equipment to tunnel
7 into the kids, or should they leave the kids there and wait
8 until the weather conditions improve, even if it would be
9 several months.

10 There were other controversies about Mr. Musk, not only
11 would the rescue sub have worked, but why was he there in the
12 first place.

13 Mr. Unsworth went to international TV before Mr. Musk said
14 anything, injected himself into these controversies and said
15 the sub wouldn't have worked. It was merely a PR stunt.

16 Now, what does that really mean?

17 What Mr. Unsworth was saying if that rescue sub had been
18 needed, and it wouldn't have worked, those kids could have
19 died, they would have been imperiled, and Mr. Musk is a person
20 who doesn't care about that, all he cared about was getting
21 publicity for himself. That's what Mr. Musk cared about. He
22 is a man willing to risk and endanger the lives of children for
23 illegitimate personal needs.

24 Now, as if it turns out that the person who is making
25 those statements is a pedophile, he is the last person who the

1 public should trust on what it means to imperil the lives of
2 children for illegitimate personal needs.

3 Now, I will be candid, calling someone that is a pretty
4 aggressive, demeaning thing.

5 But the First Amendment exists to protect speech that
6 hurts, not merely to protect speech that flatters.

7 If it turns out that Mr. Unsworth was a pedophile then
8 that would bear on his credibility to attack Ms. Musk for being
9 willing to endanger the lives of children for illegitimate
10 personal needs, so that alone makes the comments germane.

11 The other thing is that after the rescue had occurred,
12 Mr. Unsworth was giving interviews, including the CNN
13 interviews, but others, taking credit for the rescue, trying to
14 be an access point to the children, going to the hospital,
15 being photographed with them in the hospital, and injecting
16 himself into being the guardian, if you will, or one of the
17 guardians of these kids and what is in their best interest.

18 That makes his status, if he were in fact a pedophile,
19 relevant to whether he's really the one who is legitimately
20 trying to protect them.

21 I want to underscore something else, Your Honor, from the
22 D.C. Circuit's decision in *Jankovic*, which is that we not
23 conflate the falsity of the statement with germaneness.

24 It's very easy to do and say, wow, but that's a false
25 statement.

1 But the D.C. Circuit cautions against doing that and says:
2 That the germaneness part of the inquiry is not the place to
3 debate whether the statement is true or even well-supported.

4 Those questions are relevant to the actual malice inquiry.

5 So, that is what I wanted to try and recrystallize, if you
6 will, on germaneness.

7 The other issue is actual malice on the BuzzFeed e-mails.

8 The way I thought of trying to explain it, maybe a little
9 better than was explained in the papers, was first to give a
10 foundation of what the law is.

11 The truth -- the reality is that most libel cases die at
12 this part of the analysis on actual malice or no actual malice,
13 as they should, because one, it's an issue for the Court to
14 decide.

15 And two, the Supreme Court has said that even if we don't
16 like what the actual malice standard produces, it has to be the
17 appropriate standard in these kinds of cases.

18 If I can bring to the Court's attention from a moot
19 decision from the Supreme Court, the Court has recognized,
20 quote: That such a test puts a premium on ignorance,
21 encourages the irresponsible publisher not to inquire, and
22 permits the issue to be determined by the defendant's
23 testimony, that he publish the statement in good faith, and
24 unaware of its probable falsity.

25 Concededly, the reckless disregard standard may permit

1 recovery in fewer situations than what a rule that a publisher
2 must satisfy the standard of a reasonable man or the prudent
3 publisher but to ensure the ascertainment and publication of
4 the truth about public affairs, it is essential that the First
5 Amendment protect some erroneous publications as well as
6 others.

7 So in terms of the standard of actual malice, knowing
8 falsity, reckless disregard of the truth, what is the evidence
9 at this stage of the case that would allow this claim to
10 proceed?

11 Well, on the first prong, Your Honor, knowledge of
12 falsity, there is no evidence.

13 The evidence is to the contrary, and by the way, as we
14 know it has to be clear and convincing evidence, not evidence
15 you can draw inferences from, but clear and convincing evidence
16 that Musk possessed information that told him that what he was
17 saying was false. That is from the Ninth Circuit's decision in
18 the *Eastwood* case.

19 It's a subjective standard, it is what did Mr. Musk know,
20 not what he should have known or could have known if he had
21 done a different investigation.

22 There is no evidence of that. In fact, the evidence is to
23 the contrary. Both in his declaration and his deposition
24 testimony, he explained that when he made those statements in
25 his e-mails to BuzzFeed, he believed them to be true based on

1 information that was relayed to him through some -- his main
2 assistant -- deputy, what have you, from an investigator that
3 he believed to be bona fide.

4 And in the *Reader's Digest* case, the *NFF* case, *McCoy v*
5 *Hearst*, all of those cases tell us that is sufficient for a
6 defendant to pass at the summary judgment stage the issue of
7 actual knowledge of falsity.

8 What the case really comes down to is whether he had a
9 reckless disregard of the truth.

10 And there, it has to be more than a failure to
11 investigate.

12 The Supreme Court, in *Harte-Hanks* tells us: It must be a
13 deliberate decision not to acquire knowledge of facts that
14 might confirm the probable falsity of the charge.

15 In that case, in *Harte-Hanks* and in the *Antonovich* case,
16 those are the two cases that the plaintiff cites in their
17 opposition on the issue of actual malice or no actual malice.

18 In both of those cases, Your Honor, the defendant was
19 offered evidence of the falsity of the statements and refused
20 to listen.

21 The plaintiff offered to take a lie detector test. There
22 were tapes of the actual bribery involved and other evidence
23 involving Supervisor Antonovich and the speaker said, not
24 interested, not in this case, nothing like that happened here.

25 So the other flavor -- the other variant of reckless

1 disregard of the truth is having serious doubts about the truth
2 of the statement at the time it was made.

3 THE COURT: Which statement?

4 MR. SCHWARTZ: In the Buzzfeed e-mails.

5 THE COURT: What about the first statement?

6 MR. SCHWARTZ: The first statement, that is
7 different. I think that claim fails or that fails on a
8 different issue, which is the California Supreme Court decision
9 from *Good Gov't Group*.

10 It's not lack of actual malice. The issue there, Your
11 Honor, is as you may recall, Mr. Musk, in those -- the original
12 there are three Tweets, the first one he referred to
13 Mr. Unsworth as "sus," understood to be suspicious because of
14 where he lived in an area of Thailand known to be associated
15 with sex trafficking, including children, that is an opinion.

16 The other thing he says is pedo guy. "Sorry, pedo guy,
17 you deserve this. You have this coming."

18 The issue is what did he mean by "pedo guy"? Did he mean
19 it as assertion of fact, pedophilia, or did he mean it as an
20 assertion of opinion or simply a cuss word, which is what his
21 testimony was.

22 And at the motion to dismiss stage, Your Honor, the Court
23 said, I can't decide that on this record. It may be an issue
24 even for the jury but until we have some discovery and some
25 evidence, I have to accept the pleading -- the complaint as it

1 is pled, and it is pled as an assertion of fact, this claim
2 gets to proceed.

3 But now, we're at the summary judgment stage, and there
4 the evidence does matter, so --

5 THE COURT: How has the evidence changed?

6 MR. SCHWARTZ: Well, we now have evidence.

7 THE COURT: What evidence?

8 MR. SCHWARTZ: We have Mr. Musk's testimony that he
9 had no such intention to disparage -- to insult -- excuse me,
10 he had no such intention to call Mr. Unsworth --

11 THE COURT: Well, why would a Court at summary
12 judgment have to blanketedly accept the defendant's testimony
13 that he had no such intention?

14 Why isn't that a jury question?

15 MR. SCHWARTZ: Because the California Supreme Court
16 in *Good Gov't* tells you that you do have to. It is a
17 subjective test. It is what did the defendant actually think.

18 In other words, the test is --

19 THE COURT: How do I know what he was thinking?

20 MR. SCHWARTZ: We get evidence from the defendant.

21 THE COURT: I mean, up until now, I gave deeper
22 thought to what you were saying, but you sort of lost me on
23 that point.

24 I mean, how am I at the summary judgment stage supposed to
25 read someone's mind?

1 MR. SCHWARTZ: You don't. The defendant would have
2 to come forward with evidence explaining what his intentions
3 were.

4 THE COURT: That is what he was thinking. I don't
5 know what he was thinking.

6 He may have had benign thoughts. He may have had hurtful
7 thoughts, I don't know.

8 MR. SCHWARTZ: No, it is what was his intention.

9 THE COURT: I know, but you are talking about malice
10 now.

11 MR. SCHWARTZ: No, I'm not.

12 THE COURT: You were just talking about --
13 forgetting whether he had to show malice -- whether the
14 statement was defamatory at all.

15 MR. SCHWARTZ: Correct, whether it was intended as
16 an assertion of fact or not, and that is all a subjective
17 standard, Your Honor.

18 THE COURT: I don't see where things have changed
19 much since the motion to dismiss stage on that question.

20 MR. SCHWARTZ: We have an evidentiary record. We
21 have the context in which those statements were made, Your
22 Honor.

23 Mr. Musk said he explained he was being criticized by
24 Mr. Unsworth for being a PR hound, and for being incompetent.

25 And you have his testimony that he did not intend that as

1 an assertion of fact.

2 The California Supreme Court in the *Good Gov't* case tells
3 us: It is a subjective test as to whether or not it would be
4 interpreted or intended to be interpreted as a statement of
5 fact or opinion.

6 THE COURT: But did the case say that it was a
7 subjective test at the summary judgment stage?

8 MR. SCHWARTZ: I have the case right here. I will
9 tell you the stage at which it was resolved.

10 Give me one second, Your Honor, if you will please.

11 In this particular case, it was a writ petition where the
12 trial court had denied summary judgment.

13 The California Supreme Court eventually took the writ,
14 decided in that particular case on those facts that there was
15 evidence from which a jury could infer that the defendant did
16 intend the statement to be a statement of fact, not opinion,
17 and said the case can proceed.

18 But the rule of law is why we're citing the case, and the
19 rule of law is that it is a subjective standard that is ripe
20 for summary judgment if the evidence is not disputed.

21 So it is incumbent upon the plaintiff, in this case, to
22 come forward with some evidence that says when Mr. Musk said
23 these things, he obviously meant them as facts.

24 Disregard his subjective intent. They don't have any
25 evidence for that.

1 All they do is say is don't believe Mr. Musk.

2 But credibility is not sufficient evidence. It doesn't
3 create a triable issue of fact. They actually have to have
4 some evidence that says no, he actually did intend that to be
5 an assertion of fact.

6 Your Honor, I can appreciate the Court's concern with
7 this, because it sounds like it's too easy for a defendant when
8 a statement could be fact, could be opinion, to say, I meant it
9 as an opinion.

10 But that is part of what the First Amendment requires.

11 And in this particular case, I think we don't need to be
12 as sympathetic as we might need to be in any other normal case
13 because of who the plaintiff is.

14 Mr. Unsworth spends half of his time in England, half of
15 his time in Thailand.

16 He sued Mr. Musk in England under the laws of U.K., which
17 don't have the First Amendment bar like his claims do in the
18 United States, fully appreciating the difference for the two.

19 Now, for strategic reasons, his lawyers have told us he's
20 not going to pursue that claim, but if he comes to the United
21 States and files a lawsuit, he is bound by the First Amendment.

22 And whether we like it or not, the U.S. Supreme Court and
23 the California Supreme Court have told us that those are the
24 standards that are to be applied in this kind of a situation.

25 That's what I wanted to say on the issue of grounding on

1 malice.

2 If you go back to the BuzzFeed e-mails, though, and we
3 were at the second prong, Your Honor, of whether Mr. Musk was
4 acting with or what he wrote what he wrote to BuzzFeed in those
5 emails in August of 2018, he harbored serious doubts about the
6 truthfulness of what he was saying.

7 What is the evidence on that?

8 Well, as I said before, it has to be more than a failure
9 to investigate.

10 And what the *Ampex* case from the California Court of
11 Appeal tells us, Your Honor, is there must be clear and
12 convincing evidence of a quote, high degree of awareness of the
13 probable falsity of the defendant's statement. This is a
14 subjective test focused on the defendant's attitude towards the
15 veracity of the published material as opposed to his attitude
16 about the plaintiff.

17 It's not good enough to say that Mr. Musk or his people
18 hired a bad investigator or they didn't vet the investigator
19 enough, that is negligent.

20 This is not a negligence standard, so that's not -- that
21 evidence is not good enough.

22 The *NFF* case, which we cites, tells us even gross
23 negligence is not sufficient.

24 On the evidence of serious doubts, the only aspect of the
25 BuzzFeed e-mails that this pertains to is the question of

1 whether or not Mr. Musk entertained serious doubts that Tik,
2 the woman who lives with the plaintiff, was under age when she
3 met Mr. Unsworth.

4 As to the rest of Mr. Musk's e-mails to BuzzFeed, the
5 content of those e-mails that Mr. Unsworth had been living in
6 Thailand for 30 years, he had been hanging out in Pattaya
7 Beach, which is a known area for child sex trafficking, their
8 opposition didn't provide any evidence that Mr. Musk
9 entertained any serious doubts about any of that. It's
10 confined solely to how old this woman was at the time
11 Mr. Unsworth met her.

12 And as to that, the only evidence in the record is the
13 last information Mr. Musk possessed before he wrote these
14 e-mails that was relayed to him by his assistant, Mr. Birchall
15 was that she was 11 or 12 years old. That is the last
16 information that he had.

17 The fact that an earlier report may have said she might be
18 19 or 18, that doesn't tell us that he entertained serious
19 doubts.

20 It only tells us that there was earlier information that
21 had been superseded by later information.

22 If you flip it around and Mr. Musk -- the order of it is
23 at the time Mr. Musk wrote that e-mail, he had -- the latest
24 word he heard from the investigator was that she was 18 or 19,
25 maybe -- just maybe that might be some evidence to be

1 considered, but I don't even know if that is sufficient to meet
2 the clear and convincing standard.

3 But that is not this case. The facts are the opposite.

4 At the time Mr. Musk wrote those e-mails, the information
5 he had on hand was this woman was 11 or 12 years old.

6 Thank you, Your Honor. I'm happy to answer other
7 questions and discuss other issues.

8 THE COURT: Well, you may want to have a word if the
9 plaintiff has something to say.

10 MR. SCHWARTZ: Thank you, Your Honor.

11 MR. WOOD: Thank you, Your Honor.

12 I think all the creative new arguments as they were
13 described by Mr. Schwartz have been addressed fully in our
14 responsive papers.

15 I do want to make this point: I know the *Richard Jewell*
16 case. I represented Mr. Jewell for six to eight years.

17 The public controversy that was identified by the Court in
18 the Richard Jewell case was whether or not Centennial Olympic
19 Park was safe for the public to return to, the issue of the
20 safety of the park.

21 And under that specific issue, Judge John Mather, in the
22 State Court of Fulton County ruled that accusations that
23 Richard had an overzealous employment history as a police
24 officer, and questions about his behavior as a police officer
25 were germane to the public controversy that the Court found he

1 had interjected himself into by giving an interview and saying
2 the park was safe.

3 I didn't really agree with that, Your Honor, but I
4 understand it.

5 Here, they don't even define a legitimate public
6 controversy. They have some broad brush that says, well,
7 people were talking about the cave rescue. The children had
8 been rescued at the time that Mr. Unsworth gave a very brief
9 interview to CNN and answered their questions at their request,
10 and they had been clearly rescued when Mr. Musk took it upon
11 himself to accuse Mr. Unsworth of being a pedophile.

12 There is no germaneness between the general incident --
13 the public incident of the rescue to calling this man a
14 pedophile.

15 THE COURT: Well, that could be, and it goes to how
16 you define the issue -- how broadly or how narrowly -- and if
17 you define the issue broadly, it was about the rescue.

18 The rescue had been accomplished, and so that was no
19 longer an issue of public concern.

20 On the other hand, you could argue that even if the rescue
21 had been accomplished, there was an issue of public concern as
22 to whether Musk's submarine would have worked. And I think
23 that also could be an issue of public concern.

24 MR. WOOD: Your Honor, I do not disagree with that
25 analysis in that there was clearly media reports describing

1 Mr. Musk's efforts as a PR stunt.

2 That is what Mr. Unsworth said. He thought it was a PR
3 stunt.

4 If that is more than a private controversy that affects
5 Mr. Musk, the resolution, if somehow you determine that it's a
6 public controversy that impacts the public at large, then you
7 still have to come back to the question of what does the
8 accusation of pedophilia have to do with the controversy of
9 whether his tube was a legitimate viable option or whether it
10 was a PR stunt.

11 THE COURT: Well, the argument is that his history
12 of pedophilia affects his credibility.

13 MR. WOOD: If that is the test for germaneness, with
14 all due respect, then there is no such thing as a limited
15 purpose public figure.

16 Because if you go so far as to say, well, it's germane to
17 accuse a person of pedophilia when the issue has nothing to do
18 with pedophilia, then what you have in effect done is opened
19 the door to create in Mr. Unsworth, in this instance, an all
20 purpose public figure.

21 THE COURT: Not a limited purpose.

22 MR. WOOD: Correct. If you were to say -- if the
23 rationale is to say, well look, pedophilia, if it's true, which
24 we know it's not, if pedophilia is something that he privately
25 is engaged in, and since he spoke out about the tube being a PR

1 stunt, I can go in and attack his credibility by saying, hey,
2 you are a pedophile, then there is no correlation to the
3 particular issue in which the plaintiff has voluntarily
4 interjected himself.

5 He interjected himself into the issue, as we're
6 discussing, which was whether Mr. Musk's tube was a PR stunt or
7 not.

8 Then you say -- or at least they would say, well, that
9 means we can say, he's a pedophile. We can say he beats his
10 wife five times a week. We can say anything about him that
11 might impact his credibility.

12 If you are going to do that to this man, then you have in
13 effect turned him into an all purpose public figure so that you
14 can attack him on anything.

15 That is not what Vernon Unsworth could conceivably be
16 construed to be.

17 At best for them, he would be a limited purpose public
18 figure for the specific controversy of whether the tube was
19 viable or whether it was a PR stunt, and the issue of his
20 private sexual predilections would have absolutely no
21 relevance, would have absolutely no germaneness to that
22 specific issue.

23 THE COURT: How do you respond, if you wish, to the
24 arguments that the Court, on this record, ought to accept
25 Musk's declaration regarding what his subjective view was when

1 he made these statements?

2 MR. WOOD: If that were the test, Your Honor, then
3 there would be no test at all.

4 Every defendant would come in and go, this is what I was
5 thinking. End of case.

6 THE COURT: Well, I guess what the defendant is
7 saying is, and this case may not fit that model precisely, that
8 generally in summary judgment arguments, there is some
9 competing evidence, and here, the way I'm processing the
10 argument is there's no competing evidence.

11 In other words, it's almost like saying the evidence is
12 undisputed because he said so and there is no evidence to the
13 contrary; first, with regard to what his subjective view was,
14 and second, with regard to his reckless disregard for the
15 truth.

16 In other words, he hired the investigator. He didn't even
17 have to do that according to the defendant.

18 He gave reasons why he thought he was a pedophile.

19 I'm not -- when I ask these questions of either side --
20 inferring any conclusion, I'm just trying to summarize what I
21 understand to be the argument, and the argument seems to me to
22 be that, well, he was from Thailand. He lived at this beach
23 community. Everyone knows these this beach community was a
24 centerpiece for this kind of activity, and so forth.

25 So, how can you say I had reckless disregard for the truth

1 when I rendered some historical facts that it wasn't in
2 reckless disregard as a matter of law. That is the way I hear
3 the argument, in part.

4 MR. WOOD: I hear the argument, but I don't
5 understand how they can make that argument in the face of the
6 fully-developed factual record.

7 It's worthy of note, Your Honor, that Mr. Musk, for the
8 first time in August of this year, specifically at his
9 deposition on the 24th of August, despite having never said it
10 before, despite knowing that there were hundreds of articles
11 saying that you have accused Mr. Unsworth of pedophilia, he
12 never denied that until his deposition was taken. And for the
13 first time he then changed his story and said, oh, I just meant
14 that as a South African childhood insult meaning creepy old
15 man.

16 We are not -- the jury is not obligated accept the
17 defendant's statement regarding his state of mind if we develop
18 evidence, and we have a lot of it, that show that despite what
19 he says, the jury can conclude circumstantially that he had
20 knowledge, despite his denial, that he had knowledge of
21 probable falsity. He acted with a reckless disregard.

22 THE COURT: That's the important feature from your
23 standpoint. You don't have to have direct evidence to refute
24 what the defendant says his state of mind was.

25 If you have sufficient circumstantial evidence, that would

1 allow a jury to make an inference contrary to defendant's
2 assertion, then it's a jury question.

3 MR. WOOD: Absolutely. Let me make this a very
4 specific example. Mr. Schwartz, I assume inadvertently
5 misrepresented the record.

6 The last information that was provided to Mr. Musk from
7 this so-called investigator who he now says was a con-man who
8 was lying to him, the last information that he received was
9 that Vernon had married his --

10 THE COURT: Who is Vernon?

11 MR. WOOD: Vernon Unsworth, the plaintiff,
12 Mr. Unsworth, I'm sorry.

13 That Mr. Unsworth had married her when she was I believe
14 30 years old -- or that she was presently 30 years old, and he
15 was wrong about that. Tik was actually 40 years old at the
16 time of the rescue, 2018.

17 But he told Mr. Birchall who was going under a fake
18 identity of Jim Brickhouse, some kind of plan that Musk and
19 them had come up with to hide Musk's involvement in the
20 investigation, and the last thing he told him, and what he
21 repeatedly told him in writing -- and we have all of the Howard
22 communications in writing -- he said that she was 30, but that
23 had not yet been confirmed, but if that were true, that would
24 mean that they met when she was 18 or 19 years old.

25 They claim that in a telephone call -- not in the written

1 record because it is not in the written reports of Mr. Howard,
2 they claimed in an earlier telephone call that Howard had said
3 they may have met when she was 11 or 12, and then gotten
4 married when she was 18 or 19.

5 That is not in the written reports of Mr. Howard, and when
6 confronted by Mr. Birchall about the fact that, hey, I didn't
7 say she was a child rapist -- he was a child rapist -- I never
8 said that Vernon married her at 12 years of age, the
9 investigator said, I never said that.

10 But what Mr. Birchall very clearly says he told Musk in a
11 telephone call, he had gotten a telephone call from the
12 investigator saying she might have been 11 or 12 years old when
13 they met.

14 Then, Mr. Birchall said, but then the investigator said,
15 well, she may have been 18 or 19 when they met. That was the
16 last information allegedly provided by the investigator to
17 Mr. Musk.

18 He then turns around and contrary again to what has been
19 stated to this Court, Mr. Musk testified under oath that when
20 he wrote Ryan Mac in the e-mail, he did not know whether the
21 investigator's statements were true or false.

22 He disregarded truth or falsity. The jury only needs to
23 decide now whether that was reckless.

24 But then, Your Honor, after he said that he sent Mr. Mack
25 an e-mail that he now tries to contort into, hey, I was just

1 asking him to investigate. No, he wasn't.

2 In that e-mail, Elon Musk stated as a matter of fact that
3 Vernon Unsworth had married a 12 year old child. There is not
4 one shred of evidence to justify that statement even by
5 inference; it's not there. It's a lie.

6 He stated as a fact. And that is just one example of many
7 that a jury could find justifies a reckless disregard for the
8 truth of falsity.

9 THE COURT: How do you argue the point that the
10 statements were not with malice if we get -- if malice is
11 required?

12 MR. WOOD: I understand the question. And I believe
13 Your Honor understands that we believe that on compensatory
14 damages, this should be a negligence standard because we
15 believe Mr. Unsworth is a private figure plaintiff for purpose
16 of this accusation.

17 But moving to the malice, Your Honor, in the first
18 instance, you have Mr. Musk admitting that he accused
19 Mr. Unsworth of being a pedo guy which everybody understood
20 related to being a pedophile. He didn't know him. He didn't
21 even know that he had been involved in the rescue.

22 He was angry because Mr. Unsworth had criticized his tube,
23 as many others had. I think it was like the straw that broke
24 the camel's back. He said, I'm going to strike out at
25 somebody, and it's going to be Mr. Unsworth.

1 All he did was look at Google and see that Mr. Unsworth
2 was allegedly an ex-pat living in Thailand, and that is not
3 true, he was living in the UK and visiting Thailand, and Chiang
4 Rai was related to child sex trafficking, bingo, he's a pedo
5 guy.

6 That is reckless, that is manufacturing an accusation out
7 of whole cloth, and the law says that is actual malice.

8 THE COURT: Okay. I think I understand your
9 position.

10 Let me give Mr. Schwartz an opportunity if he wishes to
11 just make some pointed comments, unless there was something
12 else you had to say.

13 I really do understand your position.

14 MR. WOOD: I have nothing further, Your Honor. I
15 appreciate the opportunity to speak to those particular issues.
16 Thank you.

17 THE COURT: Yes.

18 MR. SCHWARTZ: Thank you, Your Honor, I too
19 appreciate the Court allowing us to address Your Honor on these
20 things.

21 So if I can go down the line on the things that
22 plaintiff's counsel said and tell you what our response is.

23 The first issue is on the type -- the public figure,
24 limited purpose public figure issue and germaneness.

25 And what the plaintiff tells us first, the controversy was

1 over by the time Mr. Musk showed up or by the time Mr. Musk
2 made his first Tweets.

3 First of all, that doesn't matter to the analysis. If you
4 are a limited purpose public figure on an issue, as long as the
5 issue remains in discussion, which this was, then comments made
6 about you fall within the actual malice standard.

7 But two, this was ongoing. The Thailand government was in
8 possession of two of the rescue subs that Mr. Musk's team had
9 built and was planning to use them in the future if the need
10 arose.

11 Well, if they were unsuited to the task and would put
12 someone in danger, that is a matter that concerns people well
13 beyond the participants to the debate, so --

14 THE COURT: I agree with you.

15 MR. SCHWARTZ: All right. Then the plaintiff keeps
16 losing track of what the legal standard is.

17 It's not that you would instantly say, if the only
18 controversy was will this sub work, how does pedophile relate
19 to that?

20 First of all, there is more at stake here.

21 When a person like Mr. Unsworth injects himself into the
22 public controversy, and says believe me, don't believe that
23 guy, Mr. Musk, he's a bad guy, he puts kids' lives at risk for
24 illegitimate PR purposes, believe me when I tell you what I
25 tell you about Mr. Musk.

1 The case law, including the *Jewell* case and the *Jankovic*
2 case and all of the other cases that deal with this tell you,
3 once you inject yourself, you subject yourself to pointed
4 criticism and you have to be willing to take it.

5 If it is -- only if the statements that are made about you
6 are wholly unrelated, it's not germane.

7 So counsel's position is well, if you can call
8 Mr. Unsworth a pedophile, there is no limitation on
9 germaneness.

10 We disagree.

11 I will give you a hypothetical situation.

12 Let's say instead of what Mr. Musk said, he said instead
13 Mr. Unsworth murdered his parents with a chain saw.

14 Now, I don't see how that could be -- to me, that is
15 wholly unrelated to the issues that are being debated. It has
16 nothing to do with the safety of the kids. It has nothing to
17 do with whether Mr. Unsworth should be believed about safety of
18 kids. To me, that is an easy case, therefore, there is a line
19 and this case doesn't cross that line.

20 THE COURT: Now, you are seemingly defining the
21 matter of public interest in a different way.

22 In other words, at this point the children have been
23 rescued.

24 And I agree with you, in part, that even if that was
25 accomplished, it still could remain a matter of public concern,

1 and it became a narrower issue with regard to whether
2 Mr. Musk's sub would work.

3 Why does pedophilia relate to that?

4 MR. SCHWARTZ: It's related to other controversies
5 that were brewing.

6 One, who is Mr. Musk, and why did he get involved in this,
7 and did he do it for good reasons?

8 Even before Mr. Unsworth attacked Mr. Musk on that, that
9 was already a public controversy.

10 If I can refer the Court to some of the exhibits we
11 supplied in support of our motion, Exhibit 16 and 17, for
12 example, those are July 10th, 2018 articles from the BBC, and
13 another publication, one is called, *Why was Elon Musk at the*
14 *Thai cave rescue?* It's attacking Mr. Musk for saying what
15 Mr. Unsworth was injecting.

16 THE COURT: Well, that is even -- except what you
17 just said that the question of public concern is now not
18 whether the children could be rescued -- that was done.

19 Let's pass on the issue of whether -- the issue is whether
20 the submarine would work.

21 Now, you are seemingly saying the matter of public concern
22 was Musk's motivation.

23 MR. SCHWARTZ: And whether he was willing to put
24 these kids' lives at risk.

25 THE COURT: It is motivation. So even it that is

1 the matter of public concern, how would the question of
2 Unsworth's alleged pedophilia fit into that matter of public
3 concern?

4 MR. SCHWARTZ: When someone injects themselves into
5 an issue, and says, believe me on this matter of public
6 concern, the *Waldbaum* case, which we cited, the *Jankovic* from
7 the D.C. Circuit tell us, that part of the inquiry includes
8 statements about the plaintiff's --

9 THE COURT: That part of motivation in those -- in
10 that D.C. case, you have to actually go back to the earlier
11 D.C. case, I forget the name of it now.

12 But if you read that case -- I'm not good at remembering
13 the names of cases -- but the one that you are talking about --

14 MR. SCHWARTZ: *Jankovic*.

15 THE COURT: That goes back to an earlier D.C.
16 case --

17 MR. SCHWARTZ: Yes, it does.

18 THE COURT: -- maybe 10 or 20 years earlier or more,
19 and they quote extensively from that case, and in order to
20 really understand what they mean by motivation, you have to
21 look at the earlier case.

22 And I'm not so sure that your view of motivation is really
23 what those cases are saying.

24 MR. SCHWARTZ: I believe it is, Your Honor, because
25 what the Courts say beyond the use of the word motives is, for

1 example, in *Waldbaum*, also from the D.C. Circuit, it says those
2 kinds of things about the individual, quote, could have been
3 relevant to the public's decision whether to listen to him.

4 THE COURT: I mean, everybody is going to listen to
5 Mr. Musk, aren't they?

6 MR. SCHWARTZ: That isn't the issue. The issue is
7 whether they are going to listen to Mr. Unsworth, and whether
8 they should believe what Mr. Unsworth has to say about
9 Mr. Musk.

10 THE COURT: Mean -- as a limited purpose public
11 figure?

12 MR. SCHWARTZ: Yes. The issue of limited purpose
13 public figure, germaneness, is whether when someone --

14 THE COURT: Then you come back to the point, should
15 someone listen to him or not on this issue, because he may be a
16 pedophile?

17 And you are saying his being a pedophile is germane to the
18 controversy as you now define it as to whether Musk had sincere
19 motivations.

20 I mean, that is a little bit of a stretch because the
21 comment really was his submarine wouldn't work, and he's a
22 publicity hound or something like that.

23 MR. SCHWARTZ: That's not true, Your Honor.

24 THE COURT: Well, what did he say?

25 MR. SCHWARTZ: It was a PR stunt, the sub, him

1 coming here, being involved in the rescue was a PR stunt.

2 THE COURT: So it was a PR stunt. So he's saying
3 that Mr. Musk is kind of a fraud.

4 MR. SCHWARTZ: That's what he is saying as well, but
5 it's worse than that, Your Honor.

6 He is saying this man built something that would not have
7 worked. If it had been needed, those kids could have died, and
8 Mr. Musk didn't care. He was doing this because he wanted
9 publicity.

10 THE COURT: I get it.

11 MR. SCHWARTZ: What he is saying is, Elon Musk is a
12 guy who is willing to endanger the lives of kids for
13 illegitimate personal needs. He's a bad guy, listen to me,
14 Vernon Unsworth, I know what I'm talking about.

15 THE COURT: It's germane because the public knew
16 that Unsworth was a pedophile, then he wouldn't be credible.

17 MR. SCHWARTZ: He wouldn't be credible on an issue
18 for what is good for kids.

19 Here is a guy who himself is willing to put the lives, the
20 safety, the well-being of children at risk for illegitimate
21 personal needs.

22 That's our point, that's what I'm saying, Your Honor. If
23 he was saying, you are an axe murderer or you were a tax cheat,
24 it doesn't have to do with kids, but this does because that was
25 the issue that Mr. Unsworth attacked Mr. Musk on.

1 THE COURT: A tax cheat would have everything to do
2 with credibility.

3 MR. SCHWARTZ: It would, but I am saying in terms of
4 the germaneness, the gauntlet was laid down by plaintiff saying
5 well gosh, everything is germane.

6 I'm saying it is not, but here it was, so that is what I
7 wanted to say.

8 THE COURT: Let's stop at that point, because I want
9 to give Mr. Wood an opportunity to just make one last comment
10 on the question of the motivation issue.

11 In other words, the way the argument is now being
12 perceived, it's that what Unsworth said when he injected
13 himself into this question, was that the way counsel argues
14 that when he said, this is just the PR stunt and so forth.

15 What that statement should reasonably be understood to
16 mean was that Musk is a bad guy and he was going to use a
17 submarine that wouldn't work, and therefore, kill all of these
18 children, and he had a bad motivation.

19 And now that Unsworth injected himself into this foray,
20 and let's assume that it's a matter of public concern for this
21 limited public person category that his being a pedophile is
22 relevant. That is the point that I want you to address, if you
23 wish.

24 MR. WOOD: Thank you, Your Honor.

25 THE COURT: Did I make myself clear?

1 MS. WOOD: You did. My hesitation is only because
2 this idea of what is the public controversy has shifted from
3 start to finish.

4 They have never really told Your Honor straightforward,
5 here is the public controversy that made him a limited purpose
6 public figure for that controversy.

7 THE COURT: Now, I'm just sort of going with the
8 flow here.

9 I mean, it started out in the broadest sense, kids are in
10 the cave, they have got to be rescued, okay.

11 They are rescued, now it's whether Musk's submarine would
12 have worked if they allowed it.

13 MR. WOOD: Right.

14 THE COURT: And either a subcategory of that or
15 something else is that by saying what Unsworth said, he
16 injected into the discussion, the question of whether Mr. Musk
17 is a fraud or whatever, and the question of whether Musk is a
18 fraud or not is, as I understand the argument, a matter of
19 public concern.

20 So the question is -- is that the way you understand it?

21 MR. WOOD: I'm trying to understand what
22 Mr. Schwartz just said.

23 THE COURT: That's the best argument.

24 MS. WOOD: I think you are pretty close.

25 Here is what I would say to that, that position is errant

1 nonsense. They are -- they are taking an accusation of
2 pedophilia, and they are trying to search for a public
3 controversy that somehow makes it germane.

4 It should be the other way around to define the public
5 controversy, then is the statement germane.

6 But the statement by Mr. Musk -- by Mr. Unsworth, said
7 that he didn't believe the tube would work. And he was very
8 precise. He said, it's too rigid, it won't fit through some of
9 the passages. He had mapped the cave, he knew it better than
10 anybody, and I think it's just a PR stunt.

11 Mr. Musk, in his deposition said, you know I could see why
12 somebody would say it's a narcissistic PR stunt.

13 But whether it was a PR stunt or not, whether Mr. Musk was
14 recklessly endangering the lives of those kids as some of the
15 people have said it would have been to use tube, has nothing to
16 do -- what does the public get about whether the tube would
17 work or was it a publicity stunt?

18 What does it bring to that issue of whether Mr. Musk was
19 -- his motives were bad?

20 What does it bring to issue to say you are a pedophile?

21 THE COURT: I'm going to treat you as I did
22 Mr. Schwartz. I get it, so there is no point in my being
23 overly polite, I get it.

24 MR. WOOD: Thank you.

25 THE COURT: I'm ready to rule.

1 My rulings are as follows:

2 Unsworth is not a limited purpose public figure.

3 The controversy is a matter of public concern.

4 Clearly, Unsworth injected himself into the controversy,
5 but I agree that what Musk said was not germane in any sense to
6 the plaintiff's participation in the controversy.

7 That is what has principally been argued.

8 I see no reason -- nothing in the record to change my view
9 about the fact that the statements could constitute defamation,
10 and so the short answer is that at the trial -- it will be a
11 negligence trial.

12 But then this might be something we could talk about at
13 the pretrial conference, but this is just -- was something that
14 I was thinking about, and I will issue a more detailed order
15 because I know you will want that.

16 It will take me a little time, but I will get something
17 out.

18 There also is a punitive damage claim, and that, of
19 course, gets malice into the case sideways.

20 So one way or another, malice will become an issue
21 somewhere, but not in the defamation substantive part.

22 But thank you for your arguments.

23 When is the pretrial conference, Paul?

24 THE COURTROOM DEPUTY: The pretrial conference is
25 scheduled for November 25th at 3:00 p.m.

1 THE COURT: November 25th?

2 THE COURTROOM DEPUTY: Yes, Your Honor.

3 THE COURT: Okay. And in preparation for the
4 pretrial conference, I can see that, and believe me, I'm not in
5 the business of flattery, but I know that counsel on both sides
6 are very accomplished.

7 So undoubtedly there will be a slew of motions in limine
8 and questions about jury instructions.

9 Try to surface as many of those as you can at the pretrial
10 conference.

11 I do think that as lawyers you know yourself if you
12 anticipate -- you are not going to anticipate everything but
13 you can anticipate most things -- and I try to be a Judge like
14 I was a lawyer and try and anticipate. I mean, I'm in a
15 different position, but I try to think for both sides, and it's
16 helpful to everyone once we get started with the trial to have
17 these things at least surfaced, okay?

18 Thank you.

19 MR. WOOD: Thank you, Your Honor.

20 MR. SCHWARTZ: Thank you, Your Honor.

21

22 (The proceedings concluded at 2:59 p.m.)

23 * * *

24

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